



**STATE OF WEST VIRGINIA
STATE TAX DEPARTMENT**

Joe Manchin III
Governor

Virgil T. Helton
Acting State Tax Commissioner

June 14, 2005

Mr. Stephen P.B. Kranz
Council on State Taxation
122 C Street NW, Suite 330
Washington, DC 2001-2109

Senator Angela Z. Monson
2300 North Lincoln Boulevard, Room 428
Oklahoma City, Oklahoma 73105

Commissioner Bruce Johnson
Utah Tax Commission
210 North 1950 West
Salt Lake City, Utah 84134

Re: Response to Mr. Krantz's public comments on West Virginia's petition
for membership in Streamlined Sales and Use Tax Agreement

Dear Mr. Krantz, Senator Monson and Commissioner Johnson:

The State of West Virginia petitioned for membership in the Streamlined Sales and Use Tax Agreement on April 29, 2005. The petition was signed by the State Tax Commissioner, who is the chief executive officer of the State Tax Department, pursuant to authority granted to him in W. Va. Code §11-15B-5. The State Tax Department is a separate agency within the West Virginia Department of Revenue. On May 26, 2005, we received a letter from the Council on State Taxation informing us of the conclusions reached by the informal Business Advisory Council on West Virginia's compliance with the Streamlined Sales and Use Tax Agreement. The purpose of this letter is to respond to those comments.

BAC General Comment 1: The Business Advisory Council (hereinafter "BAC") expressed general concern regarding the efforts of states to promulgate regulations where the state intends to achieve compliance with the Agreement through regulatory authority. In numerous states many regulations have not yet been promulgated and preexisting regulations have not been repealed. In addition a concern exists that states may promulgate regulations without having the proper underlying statutory authority to do so. Each state should ensure that its regulations are properly authorized.

West Virginia's Response: All of West Virginia's conforming changes have been achieved through enactment of legislation amending the State's consumers sales and use tax laws. The consumers sales and service tax law is codified in W. Va. Code §11-15-1 *et seq.*; the compensating use tax law is codified in W. Va. Code §11-15A-1 *et seq.*; and the model act and many of the conforming statutory amendments to the consumers sales and use tax laws are codified in W. Va. Code §11-15B-1 *et seq.* These conforming changes

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were enacted over a three-year period, beginning in 2003 with enactment of H. B. 3014. This was followed by enactment of Senate Bill 245 in 2004 and enactment of H. B. 3357 in 2005. The changes enacted in 2003 and 2004 took effect January 1, 2004. The changes enacted in 2005 take effect July 5, 2005, and consist of inserting the word "steam" in the definition of "tangible personal property," updating the definition of "Streamlined Sales and Use Tax Agreement," and providing for West Virginia to have four representatives on the Governing Board.

In West Virginia, administrative rules are classified as procedural, interpretive or legislative rules, as those terms are defined in W. Va. Code §29A-1-2. Administrative rules are promulgated as provided in W. Va. Code §29A-3-1 et seq. Legislative rules may be promulgated only after the Legislature passes a bill authorizing promulgation of the rule. When extraordinary circumstances exist, the Tax Commissioner may promulgate an emergency legislative rule which is effective only for defined statutory periods of time. When the emergency legislative rule is also filed as a proposed legislative rule, the emergency rule has a maximum life of 15 months and expires on the earlier of expiration of the 15 month period or promulgation of the rule pursuant to passage of a bill by the Legislature authorizing its promulgation.

The Tax Commissioner recognizes that his legislative rule for consumer sales and use taxes needs to be updated to at a minimum reflect changes in those laws since the last time the rule was promulgated pursuant to authorization of the Legislature, which passed in 1993. This will be accomplished as soon as possible, time and resources permitting, and in accordance with the statutory process for promulgating legislative rules.

BAC General Comment 2: Pursuant to §§ 303 and 401 of the Agreement, each state is required to participate in the Agreement's registration system. This system must be operational by October 1, 2005 for the states to be in compliance with the Agreement.

West Virginia's Response: West Virginia will be ready to accept registration information from the central registration system by October 1, 2005, and will be ready to begin testing the system after July 1, 2005.

Additionally, states are required to have rates and boundaries databases. West Virginia's rates and boundaries databases will be finished by July 1, 2005. Currently, the State sales and use tax rates are 6 percent. No local units of government are allowed to impose a local sales/use tax that vendors collect in addition to the State tax. West Virginia does have one economic opportunity district where vendors located in that district collect the 6 percent district excise tax in lieu of the State 6 percent sales tax. This tax is remitted to the Tax Commissioner in the same manner as the State consumers sales and service tax. The only difference is that instead of depositing the tax in the General Revenue Fund (where sales and use taxes are deposited) the district excise tax is deposited into a special fund in the State Treasurer's Office from which debt service is paid on revenue bonds sold by the Ohio County Commission to finance an economic development project. Out-of-state vendors collect West Virginia's 6 percent compensating use tax rather than the 6 percent consumers sales and service tax. When out-of-state vendors make sales to West Virginia customers, the 6 percent compensating use tax is collected regardless of the place of delivery in West Virginia, assuming they have constitutional nexus with the State or have "voluntarily registered" to collect the use tax. The earliest date that municipalities will be allowed to impose a local sales/use tax is July 1, 2008. Our law requires that these taxes be administered by the Tax Commissioner and that the base of the local tax be identical to the base of the State consumers sales and use taxes.

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BAC General Comment 3: Not all states have developed taxability matrixes required by § 328 of the Agreement. In addition there is a lack of consistency in the approach to completing these matrices when they are compared state to state. Sales price, delivery charges, direct mail, medical definitions, and installation charges are areas where the lack of consistency is most noticeable. Does N/A mean that the item is exempt or that the defined term is not necessary because the state taxes everything?

West Virginia's Response: Attached is our revised taxability matrix. West Virginia does not have product-based exemptions for any of the products listed in the taxability matrix and tax is expressly imposed on custom software. West Virginia has adopted the Agreement's definitions of sales price, delivery charges, direct mail, and medical definitions. Installation charges are taxable. Prepared food is not an issue because West Virginia does not have a product-based exemption for food and food ingredients of any kind, clothing of any kind, computers, software or any health-care products.

In West Virginia: All sales of "tangible personal property," as defined in W. Va. Code §11-15B-2(b)(40), are taxable unless an exemption applies to the transaction. West Virginia has very few product-based exemptions. For example, sales of clothing and related products, sales of food and food products, sales of health and health-related products, and sales of computers and pre-written software are taxable unless an entity-based or use-based exemption applies. Sales of "custom software" are taxable unless an entity-based or use-based exemption applies to the transaction, *see* W. Va. Code § 11-15-3(a).

The furnishing of "select services" is taxable unless an exemption applies to the transaction. Select services included in the tax base are identified in W. Va. Code §11-15-2(b)(17), §11-15B-2(b)(38) and §11-15-8. Excepted from the definition of "select services" are "personal services," as narrowly defined in W. Va. Code §11-15-2(b)(12) and § 11-15-2(b)(12), professional services, services regulated by the West Virginia Public Service Commission, other than cable television service which is taxable, "contracting services" as defined in W. Va. Code § 11-15-2(b)(3), employee services, and ancillary activities associated with sales of tangible personal property under programs or agreements providing incentives to vendors to sell a greater volume of tangible personal property under a manufacturer's, distributor's or other third-party's marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement. All other services are taxable unless an exemption applies. The term "personal services," as defined in W. Va. Code § 11-15-2(b)(12) and §11-15B-2(b)(25), is limited to services rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, manicuring and similar services, and employee services for his or her employer compensated by the payment of wages in the ordinary course of employment.

BAC Specific Comment 1: The BAC requests that West Virginia verify its "clothing" and "school supplies" administrative definition, especially with regard to the state's annual sales tax holiday.

West Virginia's Response: Sales tax holidays are not automatic in West Virginia. Legislation must be enacted before there will be a sales tax holiday during calendar year 2005, or any future calendar year. The Legislature's 60-day regular session concluded April 9, 2005. No sales tax holiday legislation was enacted. West Virginia understands that should sales tax holiday legislation be subsequently enacted exempting clothing and school supplies sold during the holiday period, the definitions of "clothing" and "school supplies" will need to conform to the definitions of these terms in the Agreement.

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BAC Specific comment 2: The BAC would like confirmation that W. Va. Code §11-15B-36(a) provides retailers and CSPs relief from liability for using erroneous data pursuant to § 328 of the Agreement.

West Virginia's Response: Subsection 11-15B-36(a) was enacted with the intention that it does conform to requirements of § 328 of the Agreement.

We will be happy to provide additional information, as necessary, regarding West Virginia's conformity to provisions of the Streamlined Sales and Use Tax Agreement.

Very truly yours,



Virgil T. Helton
Tax Commissioner

VTH/cn

cc: Scott Peterson, Interim Director, Conforming States Committee
Senator Walt Helmick, West Virginia Senate, representative to Implementing States Committee
Delegate John Doyle, WV House of Delegates, representative to Implementing States Committee
John C. Musgrave, Acting Cabinet Secretary, West Virginia Department of Revenue

electronic copies:

Commissioner Loren L. Chumley, Co-Chair, Conforming States Committee
Senator Dwight Cook, Co-Chair, Conforming States Committee
Other persons listed in the Conforming States Committee's electronic distribution database